

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

REBECCA KATE GREEN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil Action No. 13-1636
	)	
CAROLYN W. COLVIN, ACTING	)	
COMMISSIONER OF SOCIAL SECURITY,	)	
	)	
Defendant.	)	

O R D E R

AND NOW, this 23<sup>rd</sup> day of February, 2015, upon consideration of Defendant's Motion for Summary Judgment (Doc. No. 15) filed in the above-captioned matter on March 26, 2014,

IT IS HEREBY ORDERED that said Motion is DENIED.

AND, further, upon consideration of Plaintiff's Motion for Judgment on the Pleadings (Doc. No. 9) filed in the above-captioned matter on February 24, 2014,

IT IS HEREBY ORDERED that said Motion is GRANTED IN PART and DENIED IN PART. Specifically, Plaintiff's Motion is granted to the extent that it seeks a remand to the Commissioner of Social Security ("Commissioner") for further evaluation as set forth below, and denied in all other respects. Accordingly, this matter is hereby remanded to the Commissioner for further

evaluation under sentence four of 42 U.S.C. § 405(g) in light of this Order.

**I. Background**

On March 11, 2011, Plaintiff Rebecca Kate Green filed a claim for Disability Insurance Benefits under Title II of the Social Security Act, 42 U.S.C. §§ 401-434. Specifically, Plaintiff claimed that she became disabled on January 31, 2011, due to fibromyalgia, arthritis, depression, obesity, status post tumor excision secondary to spindle cell sarcoma, status post elbow fracture, a learning disability, low back strain and drug abuse. (R. 14).

After being denied benefits initially on July 15, 2011, Plaintiff completed neuropsychological evaluations, on March 19 and March 26, 2012, with P. Christopher Coburn, Ph.D., who diagnosed Plaintiff with mild mental retardation. (R. 60-69, 433-36). Plaintiff sought, and obtained, a hearing before an Administrative Law Judge ("ALJ") on August 15, 2012. (R. 78-79, 24-59). In a decision dated August 23, 2012, the ALJ denied Plaintiff's request for benefits. (R. 9-23). The Appeals Council declined to review the ALJ's decision on September 26, 2013, (R. 1-6), and Plaintiff filed a timely appeal with this Court. Plaintiff has filed a motion for judgment on the pleadings, and Defendant has filed a motion for summary judgment.

## II. Standard of Review

Judicial review of a social security case is based upon the pleadings and the transcript of the record. See 42 U.S.C. § 405(g). The scope of review is limited to determining whether the Commissioner applied the correct legal standards and whether the record, as a whole, contains substantial evidence to support the Commissioner's findings of fact. See Matthews v. Apfel, 239 F.3d 589, 592 (3d Cir. 2001) (noting that "[t]he findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive'" (quoting 42 U.S.C. § 405(g))); Schaudeck v. Comm'r of Soc. Sec. Admin., 181 F.3d 429, 431 (3d Cir. 1999) (stating that the court has plenary review of all legal issues, and reviews the administrative law judge's findings of fact to determine whether they are supported by substantial evidence).

"Substantial evidence" is defined as "'more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate'" to support a conclusion. Plummer v. Apfel, 186 F.3d 422, 427 (3d Cir. 1999) (quoting Ventura v. Shalala, 55 F.3d 900, 901 (3d Cir. 1995)). However, a "single piece of evidence will not satisfy the substantiality test if the [Commissioner] ignores, or fails to resolve, a conflict created by countervailing evidence." Morales v. Apfel, 225 F.3d 310, 317 (3d Cir. 2000) (quoting Kent v. Schweiker, 710 F.2d

110, 114 (3d Cir. 1983)). "Nor is evidence substantial if it is overwhelmed by other evidence - particularly certain types of evidence (e.g., that offered by treating physicians) - or if it really constitutes not evidence but mere conclusion." Id.

A disability is established when the claimant can demonstrate some medically determinable basis for an impairment that prevents him or her from engaging in any substantial gainful activity for a statutory twelve-month period. See Fargnoli v. Massanari, 247 F.3d 34, 38-39 (3d Cir. 2001). "A claimant is considered unable to engage in any substantial gainful activity 'only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy . . . .'" Id. at 39 (quoting 42 U.S.C. § 423(d)(2)(A)).

The Social Security Administration has promulgated regulations incorporating a five-step sequential evaluation process for determining whether a claimant is under a disability as defined by the Act. See 20 C.F.R. § 404.1520. In Step One, the Commissioner must determine whether the claimant is currently engaging in substantial gainful activity. See 20 C.F.R. § 404.1520(b). If so, the disability claim will be denied. See Bowen v. Yuckert, 482 U.S. 137, 140 (1987). If

not, the second step of the process is to determine whether the claimant is suffering from a severe impairment. See 20 C.F.R. § 404.1520(c). "An impairment or combination of impairments is not severe if it does not significantly limit [the claimant's] physical or mental ability to do basic work activities." 20 C.F.R. § 404.1521(a). If the claimant fails to show that his or her impairments are "severe," he or she is ineligible for disability benefits. If the claimant does have a severe impairment, however, the Commissioner must proceed to Step Three and determine whether the claimant's impairment meets or equals the criteria for a listed impairment. See 20 C.F.R. § 404.1520(d). If a claimant meets a listing, a finding of disability is automatically directed. If the claimant does not meet a listing, the analysis proceeds to Steps Four and Five.

Step Four requires the ALJ to consider whether the claimant retains the residual functional capacity ("RFC") to perform his or her past relevant work, see 20 C.F.R. § 404.1520(e), and the claimant bears the burden of demonstrating an inability to return to this past relevant work, see Adorno v. Shalala, 40 F.3d 43, 46 (3d Cir. 1994). If the claimant is unable to resume his or her former occupation, the evaluation then moves to the fifth and final step.

At this stage, the burden of production shifts to the Commissioner, who must demonstrate that the claimant is capable

of performing other available work in the national economy in order to deny a claim of disability. See 20 C.F.R.

§ 404.1520(g). In making this determination, the ALJ should consider the claimant's RFC, age, education, and past work experience. See id. The ALJ must further analyze the cumulative effect of all the claimant's impairments in determining whether he or she is capable of performing work and is not disabled. See 20 C.F.R. § 404.1523.

### **III. The ALJ's Decision**

In the present case, the ALJ found that Plaintiff met the insured requirements of the Social Security Act through December 31, 2015. (R. 14). Accordingly, to be eligible for Disability Insurance Benefits, Plaintiff had to establish that she was disabled on or before that date. See 42 U.S.C. §§ 423(a)(1)(A), (c)(1)(B); 20 C.F.R. §§ 404.101, .110, .131.

The ALJ then proceeded to apply the sequential evaluation process when reviewing Plaintiff's claim for benefits. In particular, the ALJ found that Plaintiff had not been engaged in substantial gainful activity since the alleged onset of disability. (R. 14). The ALJ also found that Plaintiff met the second requirement of the process insofar as she had several severe impairments, specifically, fibromyalgia, arthritis, depression, obesity, status post tumor excision secondary to spindle cell sarcoma, status post elbow fracture, a learning

disability, low back strain and drug abuse. (R. 14). The ALJ did not, at this point in his analysis, comment on Plaintiff's alleged mental retardation. The ALJ further concluded that Plaintiff's impairments did not meet any of the listings that would satisfy Step Three. (R. 14-15).

The ALJ next found that Plaintiff retained the RFC to perform simple, routine, repetitive sedentary work that affords a sit/stand option and does not require exposure to temperature extremes, unprotected heights, dangerous machinery, interaction with the public or more than incidental stooping, kneeling, crawling, crouching, balancing or climbing. (R. 15-17). At Step Four, the ALJ found, based on this RFC, that Plaintiff had established that she is incapable of returning to her past employment, so he moved on to Step Five. (R. 17). The ALJ then used a vocational expert ("VE") to determine whether or not a significant number of jobs existed in the national economy that Plaintiff could perform. The VE testified that, based on Plaintiff's age, education, past relevant work experience, and RFC, Plaintiff could perform jobs that exist in significant numbers in the national economy, such as small parts assembler, document preparer and ticket checker. (R. 17-18, 56). Accordingly, the ALJ found that Plaintiff was not disabled. (R. 18).

#### **IV. Legal Analysis**

Plaintiff argues, in essence, that the ALJ erred in finding that she was not disabled because he failed to analyze her alleged mental retardation under Listing 12.05C, 20 C.F.R. Part 404, Subpart P, Appendix 1, at Step Three of the sequential analysis. She further contends that the record establishes that her condition does, in fact, meet that listing, rendering her disabled under the Act. While the Court does not fully agree with the arguments set forth by Plaintiff, it does agree that remand is warranted in this case. Specifically, the Court finds that the ALJ failed to provide a sufficient analysis of whether Plaintiff's impairments meet or equal the criteria of a listing that would render her disabled under the Act, in particular, Listing 12.05C, but it leaves for the ALJ to determine whether Plaintiff's condition meets that listing. Accordingly, the Court finds that substantial evidence does not support the ALJ's decision, and it will remand the case for further consideration.

Listing 12.05, for "Intellectual disability," provides: Intellectual disability refers to significantly subaverage general intellectual functioning with deficits in adaptive functioning initially manifested during the developmental period; i.e., the evidence demonstrates or supports onset of the impairment before age 22." The required level of severity can be met when the requirements of Listing 12.05C are satisfied,



i.e., "[a] valid verbal, performance, or full scale IQ of 60 through 70 and a physical or other mental impairment imposing an additional and significant work-related limitation of function."

In support of her claim, Plaintiff included an assessment by Dr. P. Christopher Coburn, a licensed psychologist, who conducted a neuropsychological evaluation of Plaintiff. After meeting with her on two occasions and conducting various tests,<sup>1</sup> including the Wechsler Abbreviated Intelligence Scale (on which she scored, at 66, in the extremely low range), Dr. Coburn diagnosed Plaintiff with mild mental retardation. Plaintiff also testified at her hearing before the ALJ that she was enrolled in special education classes throughout her school history, and that she had needed to take tests such as her written driver's test and her nurse's aide test repeatedly in order to pass them. (R. 46). Additionally, Plaintiff's attorney specifically argued, before the ALJ at the administrative hearing, that Plaintiff's disabilities meet the criteria of Listing 12.05C. (R. 27).

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<sup>1</sup> Dr. Coburn stated that his evaluation included the following tests: the Wechsler Abbreviated Intelligence Scale, the Wide Range Achievement Test-4, the California Verbal Learning Test-II, the Minnesota Multiphasic Personality Inventory-2-RF, the Delis-Kaplan Executive Function System Trail Making Test, the Color-Word Interference Test and 20 Questions Test, the Rey-Osterrieth Complex Figure Test, portions of the Wechsler Memory Scale-III, the Controlled Oral Word Association and Animal Naming Tests of Verbal Fluency, the Boston Naming Test (Short Form), the Barkley Adult ADHD Rating Scale-IV (Self-Report, Current Symptom), the Barkley Deficits in Executive Function Scale-Long Form: Self-Report, the Symbol-Digit Modalities Test, and the Burns Depression Checklist and Anxiety Inventory. (R. 434)

As previously noted, the ALJ found in his decision that Plaintiff has several severe impairments, but he did not include mental retardation among them. The ALJ thus proceeded to evaluate Plaintiff's physical impairments, and he considered whether the severity of Plaintiff's mental impairments met or medically equaled only the criteria of Listing 12.04, "Affective Disorders," and not the requirements of Listing 12.05, "Intellectual disability." (R. 14-15). The ALJ ultimately found that the requirements of that listing were not met or medically equaled, and he advanced to the fourth step in the evaluation process.

Next, in determining Plaintiff's residual functional capacity, the ALJ considered Plaintiff's alleged impairments and the records of her medical treatment. At that point in his discussion, the ALJ mentioned for the first time—and then quickly dismissed—Dr. Coburn's neuropsychological examination of Plaintiff and his diagnosis of Plaintiff's mental retardation, by flatly stating that "[t]he assessment of Dr. Coburn is rejected as the Abbreviated Intelligence Test in [sic] not an acceptable measure of intelligence." (R. 17). The ALJ provided no further explanation with regard to his rejection of Dr. Coburn's assessment, other than stating that Plaintiff "is capable of functioning quite well and doing semi-skilled work." (R. 17). The ALJ did not provide any additional explanation

for, nor does he cite any authority for, his decision to reject the results from the Wechsler Abbreviated Test of Intelligence.<sup>2</sup>

Moreover, not only did the ALJ fail to sufficiently address Dr. Coburn's diagnosis of Plaintiff's mental retardation, but he also failed to provide any discussion whatsoever regarding whether Plaintiff meets the criteria of Listing 12.05C, "Intellectual disability," nor did he even mention that listing anywhere in his decision. His general analysis of the criteria of listing 12.04 is insufficient to address whether the medical findings could have met listing 12.05C, and since the ALJ simply did not address the elements of Listing 12.05C, his failure to include this listing in his decision clearly renders his analysis incomplete. While the record may ultimately provide a solid basis for finding that Plaintiff's alleged mental retardation does not meet the listing in question, there is enough evidence from the record to necessitate a more focused analysis as to the application of Listing 12.05C.

To the extent, though, that Plaintiff asks this Court to find, at this point, that she plainly meets Listing 12.05C, and that the ALJ's decision should be reversed and remanded only for

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<sup>2</sup> This test appears to have been considered, without issue, in other cases in evaluating claimants' intellectual abilities. See, e.g., Cirotti v. Astrue, No. 10-5468, 2011 WL 3425567 (D.N.J. Aug. 4, 2011) (involving an appeal from a final decision of the Commissioner denying a request for Social Security benefits); Bowser v. Astrue, No. 10-645, 2010 WL 4929087 (W.D. Pa. Nov. 30, 2010) (concerning an appeal of the Commissioner's denial of Social Security benefits).

the calculation of benefits, the Court cannot find that substantial evidence in the record as a whole indicates that Plaintiff has met the listing, or that she is disabled and entitled to benefits. See Podedworny v. Harris, 745 F.2d 210, 221-22 (3d Cir. 1984). In arguing that she meets the requirements of Listing 12.05C, Plaintiff points to, among other things, the report of Dr. Coburn as well as the medical evidence of her other impairments. Defendant, on the other hand, asserts that the record does not reveal that all of the requirements of the listing are met, as is necessary to reach the conclusion that Plaintiff is disabled.

Since the record is, at best, ambiguous as to whether Plaintiff can establish that she has met Listing 12.05C, the Court leaves the initial analysis of this particular issue, in light of the evidence of Plaintiff's alleged mental retardation, to the ALJ. See Fagnoli v. Massanari, 247 F.3d 34, 44 n.7 (3d Cir. 2001) (noting that "'[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based'" (quoting SEC v. Chenery Corp., 318 U.S. 80, 87 (1943))). Indeed, the Court expresses no opinion as to whether the ALJ's ultimate determination regarding Plaintiff's impairments could be

supported by the record. It is, instead, the need for further explanation that mandates the remand on this issue.<sup>3</sup>

**V. Conclusion**

In short, the record simply does not permit the Court to determine whether substantial evidence exists to support the ALJ's determination at Step Three that Plaintiff does not meet a listing, and, accordingly, the Court finds that substantial evidence does not support the ALJ's decision in this case. The Court hereby remands this case to the ALJ for reconsideration consistent with this Order.

s/Alan N. Bloch  
United States District Judge

ecf: Counsel of record

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<sup>3</sup> Although the Court takes no position as to Plaintiff's remaining issues, the ALJ should, of course, ensure that proper weight be accorded to the opinion and medical evidence presented in the record, and he should verify that his conclusions are adequately explained, in order to eliminate the need for any future remand.